(2)

No. 91-1805

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

ACKERMAN, HOOD & MCQUEEN, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DONALD R. LIVINGSTON
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

SUSAN L.P. STARR
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the courts below properly found that petitioner violated Title VII by discharging one of its employees because of her pregnancy-related request for a work-schedule adjustment, where petitioner liberally and routinely granted such schedule adjustments to similarly situated non-pregnant employees as a benefit of employment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Carney v. *Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987)	14
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	9
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	4, 5
Newport News Shipbuilding & Dry Dock Co. v. *EEOC*, 462 U.S. 669 (1983)	8
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	9
United States v. *Johnston*, 268 U.S. 220 (1925)	9

Statutes and regulation:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	4, 13
Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k)	2, 4, 6, 8, 11, 14
29 C.F.R. Pt. 1604 App.	9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1805

ACKERMAN, HOOD & MCQUEEN, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. C1-C9, is reported at 956 F.2d 944. The opinion of the district court, Pet. App. A1-A34, is reported at 758 F. Supp. 1440.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1992. The petition for a writ of certiorari was filed on May 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an advertising, marketing and public relations firm located in Oklahoma City, Oklahoma. This case arises out of petitioner's treatment and discharge of one of its secretaries, Phyllis Torbeck. The district court found that petitioner violated Title VII, including the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), by discriminating against Torbeck because she was pregnant, and that Torbeck's discharge resulted from the violation. Pet. App. A1-A34. It awarded Torbeck back wages and enjoined petitioner from further violations; it also required petitioner to create and implement a nondiscriminatory written policy regarding leave and schedule adjustments. Pet. App. A33. The court of appeals affirmed. Pet. App. C1-C9.

1. Petitioner hired Torbeck as a secretary in 1984. When Torbeck discovered she was pregnant in early 1986, she informed her immediate supervisor, Karen Cottrell. Pet. App. A6, A10. Although Torbeck experienced some fatigue and nausea at the beginning of her pregnancy, she did not complain to her supervisors. She did, however, mention it to a co-worker. Pet. App. A10-A11, A14. But by March 1986, Torbeck's fatigue had worsened; she also experienced headaches, lower back pain, and general discomfort. As a result, Torbeck's obstetrician, Dr. James G. Cox, wrote a letter in which he recommended that Torbeck "not be required to work more than a 40 hour work week" during her pregnancy. Pet. App. A10, A11. At the time Dr. Cox wrote the letter, he believed that Torbeck was "in good health" and so indicated in the letter. But he also believed that reducing Torbeck's work hours would alleviate her pregnancy-related symptoms. Pet. App. A11-A13.

On April 2, 1986, Torbeck submitted her doctor's letter to petitioner's management and requested that she not be required to work overtime. The next day, Bruce Anderson, one of petitioner's officers, called Torbeck to a meeting. Although Anderson had already prepared a draft letter of discharge for Torbeck, he asked Torbeck if she intended to follow her physician's recommendation by limiting her work to 40 hours per week; Torbeck said that she did. Pet. App. A12. Neither Anderson nor any of petitioner's other employees asked Torbeck about her condition; nor did anyone attempt to contact Dr. Cox. Pet. App. A12-A13. Indeed, petitioner deliberately avoided learning more of Torbeck's condition, "instruct[ing] members of its management to make only limited and narrow inquiries of Torbeck in the meetings that preceded her firing." Pet. App. A17. Later that day, petitioner summarily fired Torbeck. Pet. App. A12.

In contrast to petitioner's treatment of Torbeck's pregnancy-related request for a schedule adjustment, petitioner liberally granted similar requests made by employees who were not pregnant. Pet. App. A14-A15. For instance, while Karen Cottrell was a secretary, petitioner granted her a schedule adjustment on account of emotional problems. Although Cottrell's adjustment was greater than the one requested by Torbeck—Cottrell's hours dropped to approximately 30-33 hours per week, *ibid.*, well below the 40 hours per week Torbeck requested—petitioner did not request that Cottrell submit a doctor's note; it simply granted the request. Pet. App. A14. Similarly, petitioner permitted Jeanette Elliott to use both sick leave and personal leave so she could have plastic surgery; she did not present a doctor's statement either. *Ibid.* Petitioner also permitted Torbeck herself to take off for elective surgery in October 1985,

prior to her pregnancy; again, petitioner never requested a doctor's statement. *Ibid.* Lastly, petitioner placed Don Loewen on medical leave for several weeks without any proof of medical necessity.[1] Pet. App. A8, A14.

2. In May 1990, the Equal Employment Opportunity Commission (EEOC or Commission) filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint alleged that petitioner had treated Torbeck's request for a schedule adjustment differently than similar requests by non-pregnant employees solely because Torbeck was pregnant. EEOC contended that petitioner's conduct was discrimination on the basis of gender in violation of Title VII, including the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k). Pet. App. A2. The Pregnancy Discrimination Act amended Title VII to require employers to treat women "affected by pregnancy * * * or related medical conditions * * * the same * * * as other persons not so affected but [who are] similar in their ability or inability to work." 42 U.S.C. 2000e(k). After trial, the district court held that petitioner had violated Title VII.

The district court analyzed the evidence under the three-step framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973). Accordingly, it first determined that EEOC had established a prima facie case of discrimination by showing that Torbeck was qualified for her job and that petitioner had fired her while she was pregnant. Pet. App. A22-A23. It then turned to petitioner's

---

[1] Although petitioner claims that the district court considered only three instances in which petitioner granted employee leave requests, Pet. 12, the district court found, and petitioner stipulated, that petitioner had granted Don Loewen's request for six weeks of medical leave. Pet. App. A8.

proffered justification for its actions. See *McDonnell Douglas*, 411 U.S. at 802-803. Petitioner claimed that it rejected Torbeck's schedule-adjustment request because she failed to show that such an adjustment was medically necessary; discharge, it contended, was proper because her refusal to work overtime constituted insubordination. The district court concluded that insubordination could constitute a legitimate, nondiscriminatory reason for discharging an employee. Pet. App. A25. Accordingly, the district court turned to the third step under *McDonnell Douglas*, see 411 U.S. at 804-805, and examined whether petitioner's stated reasons were, in fact, its real reasons—or whether they were a pretext for prohibited discrimination. Pet. App. A26-A31.

Noting "a pattern of adverse actions taken by management against Torbeck that began shortly after she announced her pregnancy," Pet. App. A27, it found that petitioner's asserted justifications were pretextual. Before Torbeck became pregnant, her work and work hours had never been criticized. Shortly after Torbeck announced her pregnancy, however, petitioner "counseled" Torbeck about her attitude toward overtime and her work. See Pet. App. A30; *id.* at A12. The justification for that criticism, the court concluded, was not credible; rather, petitioner's decision to "wr[i]te [Torbeck] up" was "a pretextual effort to establish a basis for its later action." Pet. App. A15.

More important, petitioner treated Torbeck's request for a schedule adjustment differently than requests made by similarly situated non-pregnant employees. Despite a policy "of attempting to accommodate" each employee's request and a history of doing so for non-pregnant employees, petitioner made no effort to accommodate Torbeck. Pet. App. A29. While petitioner asserted that it rejected Torbeck's

request because she had failed to show that a schedule adjustment was medically necessary, the court found that justification to be pretextual. First, petitioner had never required a showing of medical necessity when considering leave or schedule adjustment requests that were not pregnancy related; it only required such proof for Torbeck's pregnancy-related request. Pet. App. A30. Second, Torbeck did in fact provide evidence of medical necessity: She gave petitioner a letter from her doctor, something no other employee had done. Pet. App. A16. Third, petitioner never told Torbeck that she needed to prove "medical necessity"; nor did it provide her with an opportunity to do so. Pet. App. A27. Instead, petitioner deliberately avoided learning more of Torbeck's medical condition, even "instruct[ing] members of its management to make only limited and narrow inquiries of Torbeck in the meetings that preceded her firing." Pet. App. A17. Thus, because petitioner (1) engaged in a pattern of adverse actions which began with Torbeck's pregnancy, (2) refused to offer Torbeck the same leave and schedule adjustments it offered to non-pregnant employees, and (3) asserted that it wanted proof that the adjustments were medically necessary despite never having required such proof from non-pregnant employees, the district court concluded that petitioner's asserted justification was a pretext for prohibited discrimination.

The court also rejected petitioner's argument that the Pregnancy Discrimination Act of 1978 (PDA) only protects a pregnant employee who shows that accommodation of her condition is medically necessary. Pet. App. A31-A32. The PDA, the court explained, requires employers to treat women affected by pregnancy the same way they treat

similarly situated non-pregnant employees. See Pet. App. A32. Thus, nothing in the PDA prohibited petitioner from requiring pregnant employees to prove that accommodation of their requests was medically necessary—so long as it required the same of non-pregnant employees. But, the court found, petitioner did not do that. Instead, petitioner required only pregnant employees to meet the higher justification of medical necessity. Pet. App. A27. Such discrimination against pregnant women in the allocation of leave and schedule adjustments, the court concluded, violated Title VII. Pet. App. A33.

3. The court of appeals unanimously affirmed. Pet. App. C1-C9. Submitting the case for determination without oral argument, Pet. App. C2 n.1, the court of appeals held that the district court properly applied the PDA and correctly found that petitioner had discriminated against Torbeck on account of her pregnancy. Pet. App. C6-C7. The court of appeals dismissed as "unconvincing" petitioner's argument that the employees whose treatment the district court had compared to Torbeck's were not similarly situated. That Torbeck, unlike those employees, was "certified * * * in 'good health' " was irrelevant, as petitioner had always granted requests for leave or schedule adjustment without inquiring into the employee's medical condition; it offered no legitimate justification for doing so with respect to Torbeck alone. Pet. App. C8. "In essence," the court of appeals noted, petitioner was arguing that, "despite a history of never inquiring into the actual physical condition of employees requesting leave, it should have been able to do so in Torbeck's case merely because she was pregnant. The P[regnancy] D[iscrimination] A[ct] was enacted

specifically to prevent this type of dissimilar treatment." *Ibid.*[2]

ARGUMENT

Petitioner asserts two objections to the decisions below. Neither involves a division in circuit authority; neither has application beyond the limited facts of this case; and neither has merit. Accordingly, further review is unwarranted.

1. The Pregnancy Discrimination Act of 1978 amended Title VII to require employers to treat women "affected by pregnancy * * * or related medical conditions * * * the same * * * as other persons not so affected but [who are] similar in their ability or inability to work." 42 U.S.C. 2000e(k). As this Court has explained, the Act "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 684 (1983). Petitioner does not disagree. See Pet. 13-14. Nor does petitioner challenge the propriety of inferring prohibited discrimination from an employer's disparate treatment of similarly situated pregnant and non-pregnant employees. Pet. 13 ("In disparate treatment cases" the plaintiff may "raise an inference of unlawful discrimination" through "comparison of the treatment accorded to plaintiff with the treatment accorded other employees.") (internal quotation marks and citations

---

[2] The court also rejected petitioner's argument that the PDA requires the district court to compare pregnant employees' leave requests only to similar leave requests from *male* employees, finding that such an argument "lacks merit." Pet. App. C7-C8. Petitioner does not assert that argument here. See Pet. 15 n.5.

omitted).[3] Indeed, petitioner does not even contend that the courts below misstated the law. Rather, petitioner simply argues that the courts below misapplied the law to these particular facts by basing their comparisons on employees who were not, in fact, similarly situated. Pet. 14 (courts below based inference of discrimination on "impermissible" and "baseless" comparisons of situations that were "foreign to each other"). That fact-bound contention does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

In any event, the contention is unfounded. In the approximately four pages devoted to the "comparison issue," Pet. 11-15, petitioner offers not a single reason why the other employees were not similarly situated to Torbeck. Each of the employees, like Torbeck, was under petitioner's unwritten leave policy. Pet. App. A29. Each, like Torbeck, requested leave or a schedule adjustment because of a medically related condition. Pet. App. A14-A15. And each—unlike Torbeck—had his or her request granted without any proof of medical necessity or any inquiry into his or her actual health. That unexplained disparate treatment properly raised an inference of discrim-

---

[3] Accord *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981) (A "plaintiff's task [is] to demonstrate that similarly situated employees were not treated equally."); 29 C.F.R. Pt. 1604 App., Nos. 5, 6, at 205 (employer must treat an employee who is temporarily unable to perform her job in the same manner it treats other temporarily disabled employees; employer must apply the same procedures for determining an employee's ability to work to pregnant and non-pregnant persons).

ination on account of pregnancy, as the courts below correctly held. Pet. App. A27-A29, C7.

Nonetheless, petitioner suggests in its question presented that Torbeck "unequivocally expresse[d] * * * her intent not to work more than 40 hours per week for the duration of her normal, healthy pregnancy, regardless of her actual physical condition." Pet. i; see also Pet. 11 ("It is undisputed that Phyllis Torbeck * * * was enjoying a normal, healthy pregnancy when she demanded that, because of her pregnancy, she be granted a categorical exemption from working overtime for the duration of her pregnancy."). Other employees, petitioner suggests, were different because they made a showing of need. Pet. i. ("[H]ealth related requests * * * from other employees had uniformly been granted only on an as-needed basis."); Pet. 7 (Torbeck did not show "that there was any medical necessity for elimination of further overtime."). Both suggestions are incorrect.

a. As an initial matter, it is not true that Torbeck refused to work overtime regardless of her physical condition; the district court specifically rejected that contention: "Contrary to [petitioner's] contentions, Torbeck did not refuse to work overtime." Pet. App. A17. What Torbeck did do was tell petitioner that she "intended to follow her doctor's recommendation," Pet. App. A12-A13, a recommendation which, of course, depended on her physical condition. As the district court explained, the accommodation Torbeck requested was "commensurate" with her physical complaint and its "medical basis." Pet. App. A16.

Nor is it true that Torbeck's request for accommodation was different because she failed to demonstrate "medical necessity." On the contrary, no other employee made, and petitioner never required, a showing of medical necessity. Pet. App. A30. Such disparate

proof requirements for pregnant and non-pregnant employees is itself facially discriminatory, as the court of appeals explained: An employer with "a history of never inquiring into the actual physical condition of employees requesting leave" may not do so in the case of a pregnant employee solely "because she is pregnant. The PDA was enacted specifically to prevent this type of dissimilar treatment." Pet. App. C8.

In any event, Torbeck's alleged failure to prove medical necessity was not the real reason petitioner denied her request. Pet. App. A29. Petitioner never required any other employee to prove medical necessity; it never told Torbeck such proof had to be produced; and it never gave her an opportunity to do so. Instead, petitioner first asserted that such proof was required when it began defending this lawsuit. Pet. App. A27-A30; *id.* at A13-A14. And Torbeck did prove medical need: She gave petitioner a letter from her doctor, far greater evidence of need than any non-pregnant employee provided. Pet. App. A16. Petitioner simply chose to ignore it. See pp. 13-14, *infra.*

b. Petitioner's reliance on the fact that Torbeck had a "normal, healthy pregnancy," Pet. i, 7, is similarly misplaced. Nothing in the PDA distinguishes between healthy and difficult pregnancies; and certainly nothing in it licenses employers to treat healthy pregnancies disfavorably so long as they afford difficult ones equality. Instead, the PDA recognizes that any pregnancy—healthy or otherwise—is a medical condition and must be treated equally with all others. See 42 U.S.C. 2000e(k). Here, Torbeck's healthy pregnancy produced "fatigue, nausea, lower back pain, and headaches," normal symptoms properly treated with rest. Pet. App. A29-A30. Because petitioner would have accommodated pursuit of

such treatment by an employee suffering similar symptoms on account of a medical condition other than pregnancy, it was required to permit employees suffering those symptoms on account of pregnancy to do the same. But rather than treat all medical conditions equally, petitioner denied Torbeck's request, affording it unfavorable treatment because it was prompted by a "healthy" pregnancy rather than some other medical condition.

c. Finally, petitioner asserts that the courts below created "substantive requirements" which require "preferential treatment" of pregnant workers. Pet. 11, 13. That assertion is baseless. At no point did the courts below hold that the PDA requires employers to treat pregnant workers more favorably than other workers. Indeed, the court of appeals made it abundantly clear that all the PDA requires is *equal* treatment of pregnancy-related and other disabilities. See Pet. App. C5 (PDA prevents "*differential* treatment of women in all aspects of employment based on the condition of pregnancy" (emphasis added; internal quotation marks omitted)); *id.* at C7 (The PDA "requires courts to inquire whether the employer treats pregnancy or pregnancy related conditions *differently* than other medical conditions.") (emphasis added). Thus, petitioner's error was not its failure to give Torbeck what she asked for; it was refusing to accord Torbeck the *same* accommodations afforded to similarly situated non-pregnant employees.[4]

---

[4] Likewise, the district court, Pet. App. A17, did not hold that an employer's leave policies must be "reasonable," Pet. 14 n.4. Instead, the court merely made a factual finding that Torbeck's request for a schedule adjustment was reasonable and therefore met the requirements of petitioner's liberal leave and schedule adjustment policy, Pet. App. A16-A17, a finding the

2. Petitioner's second argument is that the PDA did not apply because Torbeck never told petitioner that she had a pregnancy-related medical disability. Pet. 15-16. Specifically, petitioner asserts that "a finding of discrimination under Title VII may not be predicated upon facts or employee attributes which were not made known to the employer at the time of the [employer's] challenged decision." Pet. 16. That contention is factually and legally baseless.

Contrary to petitioner's assertion, Torbeck did communicate the facts that she was pregnant and that her pregnancy was the basis for her request for a schedule adjustment. She even presented petitioner with a letter from her doctor stating that he recommended a schedule adjustment "because of her pregnancy." Pet. App. A11, A12, A15-A17.[5] As the district court found, "a medical basis for [Torbeck's requested] schedule modification existed" and Torbeck communicated that medical basis by presenting petitioner with her doctor's letter. Pet. App. A16. But rather than accept the recommendation of Torbeck's doctor, petitioner chose to ignore it—with no medical basis for doing so. Pet. App. A13. If petitioner had truly desired or needed more information regarding

---

court of appeals upheld, Pet. App. C8-C9. Because reasonableness was the touchstone by which petitioner determined whether or not to grant requested accommodations, see Pet. App. A29, it was proper for the court to determine whether Torbeck's request met that standard. After all, if Torbeck's request did not meet petitioner's usual standard, then the gender discrimination caused Torbeck no harm: Her request would have been denied in any event.

[5] It is true, as petitioner contends, that the letter attests to Torbeck's "good health." Pet. 15. But, as explained above, see pp. 11-12, *supra*, the question of whether Torbeck was in good or ill-health is irrelevant.

Torbeck's actual condition, petitioner could easily have requested it from Torbeck or her doctor. But petitioner did not. Pet. App A15-A16, A29-A30. In fact, petitioner must have been well aware of the basis for petitioner's request, as it studiously avoided learning more of it: Petitioner actually "instructed members of its management to make only limited and narrow inquiries of Torbeck in the meetings that preceded her firing." Pet. App. A17. Thus, contrary to petitioner's assertions, Torbeck did communicate the basis for her request and her medical condition to petitioner. Petitioner simply chose to ignore it.

In any event, even if the facts were open to dispute —and they are not—petitioner's challenge would still fail. The protections of the PDA are not triggered, as petitioner seems to believe, Pet. 15-16, by the employee's communication that accommodation of her pregnancy-related disability is "medically necessary." All the statute requires is that employers treat pregnant employees the same way they treat similarly situated non-pregnant employees. 42 U.S.C. 2000e(k) ("[W]omen affected by pregnancy * * * shall be treated the same for all employment-related purposes" as similarly situated non-pregnant workers.); see also *Carney* v. *Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987) (the PDA was added to Title VII "to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy"). As explained above, see pp. 10-11, *supra*, had petitioner routinely required its employees to provide evidence of the medical basis for the accommodations they sought, it would have been free to require such evidence from pregnant employees like Torbeck. But petitioner did not require proof of medical necessity from non-pregnant employees; nor did it ever require detailed descriptions of

their symptoms. It never even requested a doctor's letter, something Torbeck, unlike any other employee, produced—but which petitioner inexplicably rejected. In short, only Torbeck's pregnancy-related request was subjected to exacting scrutiny and then rejected. Such unequal and unfavorable treatment of pregnancy compared to other medical conditions is precisely the type of discrimination the PDA proscribes. The courts below were correct to so hold.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DONALD R. LIVINGSTON
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

SUSAN L.P. STARR
Attorney
Equal Employment Opportunity Commission

JUNE 1992